

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1164

Cir. Ct. No. 2013CV966

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DEWITT LONDRE, LLC,

PLAINTIFF-APPELLANT,

V.

INVESTMENT REAL ESTATE SPECIALISTS, LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. DeWitt Londre, LLC (Londre) appeals an order denying its motion for summary judgment and granting Investment Real Estate Specialists, LLC's (Specialists) motion for summary judgment on Londre's claims for breach of contract, unjust enrichment and promissory estoppel. Londre argues,

among other things, that the circuit court erred as a matter of law when it concluded Londre violated WIS. STAT. § 452.133(4)(b), which the circuit court construed as providing Specialists with a complete defense against Londre's claims.¹ We conclude a violation of § 452.133(4)(b), which—if proven—is punishable as set forth separately in WIS. STAT. ch. 452, cannot be used as a shield against the common-law claims brought by Londre. Accordingly, we reverse and remand to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

¶2 Londre, a real estate firm, filed this lawsuit against Specialists in 2013, alleging the following facts. Specialists was the listing broker for real property located in the Town of Buchanan in Outagamie County, Wisconsin. In November 2012, Chris Hitler, on behalf of Specialists, spoke with David Allen regarding the potential sale of the property. Allen, who was employed by Londre, suggested a group of potential buyers that included himself, Greg Graf, Richard Bierman, and Benjamin LaFrombois. Ultimately, Allen elected not to join the other three individuals in their purchase of the property.²

¶3 The underlying dispute in this case is whether, by virtue of various common-law theories, Specialists owes Londre a portion of the brokerage fee associated with the sale of the property. The complaint alleges that in December

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² The offer to purchase identifies the buyer as Wolf River Partners, LLC, of which Allen, along with Graf, Bierman, and LaFrombois, was apparently a member. However, the closing statement indicates the buyer was N143 Speedway Lane, LLC. It is not evident from the record whether Allen was a member of that business entity.

2012, Scott DeWitt, one of Londre's members and a broker for the company, sent Hitler an email requesting verification that Specialists would "co-broke" with Londre. Hitler's response email stated, "Sure, I offer co-broke 50/50 split for brokers (versus principals)." The property ultimately sold for \$565,000. Specialists received a \$28,900 commission, half of which Londre seeks as damages in this suit pursuant to its claims for breach of contract, unjust enrichment, and promissory estoppel.

¶4 Specialists filed a motion for summary judgment in January 2014, supported by an affidavit from Hitler. Hitler averred that while the transaction was pending, he received an email from LaFrombois stating the buying group was "not being represented by any broker or agent" in the purchase.³ Specialists argued that the breach of contract, unjust enrichment, and promissory estoppel claims each failed on their merits, and that all three claims were barred because Londre failed to comply with WIS. STAT. § 240.10(1), which describes the requirements for contracts that pay commissions to real estate brokers.

¶5 Londre opposed Specialists' summary judgment motion and filed its own motion for summary judgment, supported by an affidavit from Allen. Londre asserted the circumstances of the transaction gave rise to a subagency agreement, under which Londre did not represent the buyers but, rather, assisted Specialists in

³ The fact that Londre did not represent the buying group was conceded by Londre in the circuit court, and it is not disputed on appeal.

providing brokerage services on behalf of the sellers in the transaction.⁴ Londre argued that the undisputed facts established all elements of its claims and that Specialists' defenses were unfounded, including Specialists' assertion that any agreement was void under WIS. STAT. § 240.10(1). Specifically, Londre argued that § 240.10(1) "does not apply to co-broke/subagency agreements between two sophisticated brokers, as is the case here," and that it was permitted to assert claims for unjust enrichment and promissory estoppel even if § 240.10(1)'s requirements had not been satisfied.

¶6 Specialists' response brief noted Londre's subagency theory was not set forth in the complaint, and so Specialists had not previously addressed it. Nonetheless, Specialists argued that the evidence—consisting of numerous email messages between Allen and the buying group—demonstrated Allen "was not acting as an employee of [Londre], but rather as a member of the Buyers' investment group (Wolf River Partners, LLC), when he first connected the Buyers with [Hitler] in November 2012." Specialists further argued that even if Londre's subagency theory was correct, Londre violated its duties as a subagent; namely, by failing to provide a written disclosure statement to the buying group, contrary to WIS. STAT. § 452.135(1)(b), and by attempting to procure a lower purchase price for the buyers against the interests of the seller, contrary to WIS. STAT. § 452.133(4)(b).

⁴ The statutory definition of a subagent is "a broker who is engaged by another broker to provide brokerage services in a transaction, but who is not the other broker's employee." WIS. STAT. § 452.01(7r). According to one commentator, subagency routinely occurs in the normal course of real estate practice: "[a] common example is when a broker (the subagent) agrees to cooperate with another broker (the principal broker) to provide brokerage services to a client of the principal broker by showing a property listed with the principal broker to a potential buyer." Robert C. Leibsle, *The "New" Chapter 452: Defining Real Estate Broker Practice*, WIS. LAW., June 2006, at 11, 56.

¶7 After briefing was complete, the circuit court granted Specialists’ summary judgment motion and denied Londre’s summary judgment motion. The court deemed it clear the parties had “an agreement that if [Londre] represented a buyer that Hitler would share the commission,” but deemed it unclear whether that agreement had a subagency component. Nonetheless, the court concluded it could assume, without deciding, that a subagency agreement existed, in essence adopting Londre’s argument on that issue.

¶8 The court then proceeded to determine whether “Londre acted as a subagent as statutorily required.” The court concluded the undisputed facts established that Londre violated WIS. STAT. § 452.133(4)(b). The court noted the absence of case law regarding whether a violation of § 452.133(4)(b) disqualified the subagent from a commission, but found the “implication is surely present in the statute.” The court concluded the legislature did not intend for a subagent who violates the statute to receive a commission, and therefore held that Londre was not entitled to share in the commission from the sale. Londre appeals.

DISCUSSION

¶9 We review a grant of summary judgment de novo. *Enea v. Linn*, 2002 WI App 185, ¶11, 256 Wis. 2d 714, 650 N.W.2d 315. A party is entitled to summary judgment if there is no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. *Chapman v. B.C. Ziegler & Co.*, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425 (citing WIS. STAT. § 802.08(2)). The purpose of the summary judgment procedure is to “avoid trials where there is nothing to try.” *Kasbaum v. Lucia*, 127 Wis. 2d 15, 24, 377 N.W.2d 183 (Ct. App. 1985).

¶10 Ordinarily, when we review a grant of summary judgment, we examine the pleadings to determine whether a claim for relief has been stated, and then we assess whether those pleadings reveal the existence of a disputed factual issue. *Erdmann ex rel. Laughlin v. Progressive N. Ins. Co.*, 2011 WI App 33, ¶7, 332 Wis.2d 147, 796 N.W.2d 846. Neither party has challenged the sufficiency of the pleadings in this appeal, so we move to the next step, where we must determine whether the moving party—in this case, the prevailing defendant—made a prima facie case for summary judgment. *See id.*

¶11 A defendant establishes a prima facie case for summary judgment by showing a defense that would defeat the plaintiff’s claim. *Id.* The central issue in this appeal is whether the circuit court correctly determined that Specialists was entitled to summary judgment by operation of WIS. STAT. § 452.133(4)(b). Whether that statute, if applicable, provides Specialists with a complete defense is a question of law. *See MercyCare Ins. Co. v. Wisconsin Comm’r of Ins.*, 2010 WI 87, ¶26, 328 Wis. 2d 110, 786 N.W.2d 785 (statutory interpretation presents a question of law).

¶12 “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. We first look to the language of the statute, which is given its ordinary, common, and accepted meaning. *Id.*, ¶45. “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*, ¶46. If this process yields a plain, clear meaning, we ordinarily end the inquiry and apply the statute in accordance with that meaning. *Id.*, ¶¶45-46.

¶13 WISCONSIN STAT. ch. 452 governs real estate practice by brokers in Wisconsin. WISCONSIN STAT. § 452.133, in turn, enumerates the duties owed by brokers and subagents. As relevant here, the statute provides:

(4) SUBAGENT’S DUTIES. ...

(b) A subagent may not do any of the following:

1. Place the subagent’s interests ahead of the interests of the clients of the principal broker in the transaction in which the subagent has been engaged by the principal broker.
2. Provide advice or opinions to parties in the transaction if providing the advice or opinions is contrary to the interests of the clients of the principal broker in the transaction in which the subagent has been engaged by the principal broker, unless required by law.

WIS. STAT. § 452.133(4)(b).

¶14 The circuit court acknowledged “there is no case law interpreting [the statute to hold that] a subagent’s failure to act solely in the interest of the principal broker’s clients would disqualify the subagent from ... a promised commission”⁵ However, it concluded such a result was “surely present [by implication] in the statute.”

¶15 Londre counters that WIS. STAT. § 452.133(4)(b) is intended only to protect the principal broker’s clients, not the principal broker. Londre argues that even if it is found to have violated the statute, such violation would not require Specialists to return any portion of the commission to the client. In other words, Londre argues the statute cannot be interpreted as providing the principal broker

⁵ Indeed, there appears to be no case law whatsoever interpreting WIS. STAT. § 452.133(4)(b).

with a complete defense to any common-law contract or quasi-contract claims because doing so does not protect the client in any way—the client will have paid the same total commission regardless of whether Londre violated the statute.

¶16 We concur with Londre that the primary purpose of WIS. STAT. § 452.133(4)(b), as is evident from its language, is to protect the principal broker’s client from unscrupulous subagents. Subdivision (4)(b)1. prohibits subagents from placing their interests ahead of those of the principal broker’s clients. Subdivision (4)(b)2. generally prohibits subagents from providing advice or opinions that operate contrary to the interests of the principal broker’s clients. Nothing in § 452.133(4)(b) can be read to indicate a legislative concern for the well-being of the principal broker, nor the protection of its commission, in a subagency arrangement. Meanwhile, the legislature has not statutorily provided that violators of § 452.133(4)(b) are not entitled to commissions, whether promised by principal brokers or more generally.

¶17 Specialists argues that WIS. STAT. § 452.133(4)(b) is toothless if a subagent who violates it may nonetheless recover a commission on a sale. To the contrary, the legislature embedded a separate penalty provision in WIS. STAT. ch. 452. A violation of WIS. STAT. § 452.133(4)(b) subjects the offender to a maximum of \$1,000 in fines, six months’ imprisonment, or both. *See* WIS. STAT. § 452.17(3). If Londre indeed violated § 452.133(4)(b)—a matter we need not and do not determine—it was a crime: an offense against the sovereign to be prosecuted by public officials. *See State ex rel. Prentice v. County Court, Milwaukee Cnty.*, 70 Wis. 2d 230, 241-42, 234 N.W.2d 283 (1975); *State ex rel. Keefe v. Schmiede*, 251 Wis. 79, 84, 28 N.W.2d 345 (1947). This criminalization of the conduct, including the threat of incarceration, gives the statute plenty of “teeth.”

¶18 Further, Specialists has not cited any case law establishing that a violation of a criminal statute—if proven—provides a complete defense against common-law claims for breach of contract, unjust enrichment, and promissory estoppel. What is more, beyond Specialists’ mere suggestion that the statute is toothless unless we adopt its interpretation, Specialists has failed to present any legal argument justifying the use of a criminal statute to preclude a civil remedy. Given the absence of such authority and argument, we deem Specialists’ argument inadequate and underdeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court need not address arguments that are inadequately briefed or that lack supporting legal authority).

¶19 In any event, this rule, which Specialists implicitly endorses, would potentially curtail liability under long-established common law doctrines. A statute does not abrogate or change the common law unless that intention is clearly expressed in the statute’s language. *See, e.g., Jorgensen v. Water Works, Inc.*, 218 Wis. 2d 761, 780, 582 N.W.2d 98 (Ct. App. 1998); *Richardson v. Stuesser*, 125 Wis. 66, 71-72, 103 N.W. 261 (1905). We find no such clearly expressed intention in the language of WIS. STAT. § 452.133(4)(b) or elsewhere in WIS. STAT. ch. 452.

¶20 We conclude the circuit court erred as a matter of law in granting summary judgment on the basis stated in its order. A violation of WIS. STAT. § 452.133(4)(b), if there was one, did not require the circuit court to dismiss Londre’s common-law contract and equitable claims outright, although such a violation may have other consequences. This conclusion alone provides a sufficient basis upon which to reverse the circuit court’s order. Given that (1) the circuit court assumed without deciding that there was an agreement between the parties and, further, that a subagency existed; and (2) the parties did not brief on

appeal the additional, competing bases for summary judgment, we do not address whether either of the parties are entitled to summary judgment for reasons not addressed by the circuit court. *See Flooring Brokers, Inc. v. Florstar Sales, Inc.*, 2010 WI App 40, ¶15, 324 Wis. 2d 196, 781 N.W.2d 248 (remand for further proceedings appropriate when circuit court does not address alternative grounds); *Kane v. Employer's Ins. of Wausau*, 142 Wis. 2d 702, 705, 419 N.W.2d 324 (Ct. App. 1987) (we decline to consider issues *sua sponte* when neither party has raised or briefed them). Rather, we remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

